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No. 00-1839

In The Supreme Court of the United States

ROBERT MACDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an ordinance that requires a permit for demonstrations and other events that will obstruct the public ways, and that limits municipal officials to consideration of criteria addressed to only the time, place, and manner of the proposed event when acting on permit applications, is a prior restraint on speech within the meaning of the First Amendment.

2. Whether an ordinance granting licensing authorities discretion to evaluate the time, place, and manner of proposed events that will obstruct the public ways under identified criteria that are unrelated to the content of anyone's speech grants effectively unchecked discretion to licensing authorities in violation of the First Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	5
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: Page

11126 Baltimore Boulevard, Inc. v. Prince George's County, 58 F.3d 998 (4th Cir.) (en banc), cert. denied, 516 U.S. 1010 (1995) 15
American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10th Cir.), cert. denied, 531 U.S. 811 (2000) 16
Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) 15
Beal v. Stern, 184 F.3d 117 (2d Cir. 1999) 16
Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121 (7th Cir. 2001) 15
Boos v. Barry, 485 U.S. 312 (1988) 13
Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999) 15
Cannabis Action Network v. City of Gainesville, 231 F.3d 761 (11th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3657 (U.S. March 29, 2001) (No. 00-1503) 8, 16
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 10, 12
City News & Novelty, Inc. v. City of Waukesha, 121 S. Ct. 743 (2001) 15
Cox v. New Hampshire, 312 U.S. 569 (1941) ..... *passim*
East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir.), cert. denied, 516 U.S. 909 (1995) 15
Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) 15
Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 10
Freedman v. Maryland, 380 U.S. 51 (1965) ..... *passim*
Frisby v. Schultz, 487 U.S. 474 (1988) 14
FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 10, 11

TABLE OF AUTHORITIES—Continued

Page

Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), cert. denied, 511 U.S. 1085 (1994) 3
Grayned v. City of Rockford, 408 U.S. 104 (1972) 13, 15
Handley v. City of Montgomery, 401 So. 2d 171 (Ala. Crim. App. 1981) 14, 16
Harkins v. Greenville County, 533 S.E.2d 886 (S.C. 2000), cert. denied, 121 S. Ct. 880 (2001) 15
Hill v. Colorado, 530 U.S. 703 (2000) 8
Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993) 16
MacDonald v. Safir, 206 F.3d 183 (2d Cir. 2000) 16
O'Connor v. City and County of Denver, 894 F.2d 1210 (10th Cir. 1990) 15
Outdoor Media Dimensions, Inc. v. State, 945 P.2d 614 (Or. Ct. App. 1997), aff'd, 20 P.3d 180 (Or. 2001) 16
P.M. Realty Investments, Inc. v. City of Tampa, 779 So. 2d 404 (Fla. Dist. Ct. App. 2000) 16
Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 10
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 10
State v. Frinks, 201 S.E.2d 858 (N.C. 1974) 16
Stonewall Union v. City of Columbus, 931 F.2d 1130 (6th Cir.), cert. denied, 502 U.S. 899 (1991) 14
Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir. 2000), cert. granted, 121 S. Ct. 2191 (2001) (No. 00-1249) 5, 6, 15, 17

TABLE OF AUTHORITIES—Continued

	Page
TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994)	15
United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)	14
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	7, 8
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	14
ORDINANCE:	
Municipal Code of Chicago, Ill. § 10-8-330(a)(1) (2000)	1
Municipal Code of Chicago, Ill. § 10-8-330(a)(2) (2000)	1
Municipal Code of Chicago, Ill. § 10-8-330(b) (2000)	1
Municipal Code of Chicago, Ill. § 10-8-330(c) (2000)	2
Municipal Code of Chicago, Ill. § 10-8-330(e) (2000)	2
Municipal Code of Chicago, Ill. § 10-8-330(h) (2000)	3, 14
Municipal Code of Chicago, Ill. § 10-8-330(i) (2000)	2, 3
Municipal Code of Chicago, Ill. § 10-8-330(*l*) (2000)	3, 13

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Chicago's parade permit ordinance requires a permit from Chicago's Department of Transportation for any "parade," defined as any march or procession that "does not comply with normal and usual traffic regulations or controls," Municipal Code of Chicago, Ill. § 10-8-330(a)(1) (2000), or any "public assembly," defined as "a company of persons which is reasonably anticipated to obstruct the normal flow of traffic upon the public way and that is collected together in one place," *id.* § 10-8-330(a)(2). See *id.* § 10-8-330(b).[1] Under the ordinance, permit applications must be filed not less than seven business days before the proposed event. See

[1] The pertinent ordinance is reproduced in the appendix to the petition for a writ of certiorari. See Pet. App. 104a-114a.

id. § 10-8-330(c). The application must contain the name, address, and telephone number of the person signing the application and the other authorized and responsible leaders of the organization conducting the event; the date and time of the proposed event; the location of the proposed assembly and disbanding areas; the approximate number of persons expected to participate in the event and the basis on which the estimate is made; and the proposed route including the sidewalks or lanes of traffic it will occupy. See *id.* § 10-8-330(e). The Commissioner of Transportation must then act upon the application within two business days. See *id.* § 10-8-330(i).

Under the ordinance, the Commissioner of Transportation must issue a permit when the Commissioner finds that:

> (1) The proposed activity will not substantially or unnecessarily interfere with the traffic in the area contiguous to the activity or that if the activity will substantially interfere with such traffic, there are available at the time of the proposed activity sufficient City resources to mitigate the disruption;
>
> (2) There are available . . . a sufficient number of police officers to police and protect lawful participants in the activity and non-participants from traffic related hazards in light of the other demands for police protection at the time of the proposed event or activity;
>
> (3) The concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade . . . route will not prevent proper fire and police protection or ambulance service;
>
> . . . .
>
> (8) the application contains sufficient information about the proposed route and crowd estimate to enable the Commissioner to evaluate the proposed event under this section.

Municipal Code of Chicago, Ill. § 10-8-330(h) (2000). If the Commissioner disapproves an application, the Commissioner must "provide by facsimile transmission or telephonically and by mail directed to the applicant within two business days after the date upon which the application was filed, notice of his or her action, stating the facts and conclusions which are the basis for his or her denial of the permit." *Id.* § 10-8-330(i). Any aggrieved applicant may appeal to the Mayor's License Commission, which must hold a hearing within three business days and then either affirm or reverse the Commissioner's decision. *Id.* Any final decision on an application "shall be subject to judicial review in accordance with applicable law." *Id.*[2] If either the Commissioner or the Mayor's License Commission fails to act on an application within the time allowed by the ordinance, an "application for a permit shall be deemed approved and the permit deemed granted in conformance with the application." *Id.* Moreover, "[i]f the Commissioner denies an application for the failure to provide sufficient information about the proposed route or crowd estimate, he shall specify what additional information must be provided in a new or amended application." *Id.* § 10-8-330(*l*). In addition, whenever the Commissioner denies an application, he must also issue an alternate permit for an event which "shall to the extent practicable authorize an event that will have comparable visibility and a similar route, location and date to that of the proposed event." *Id.*

Robert MacDonald was an "activist" who organized marches advocating the legalization of marijuana. *See* Pet. App. 52a.[3] He filed this suit challenging the constitutionality

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[2] Judicial review of municipal permitting decisions is reviewable under Illinois law by common law certiorari. See, *e.g.*, *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc) (plurality opinion), cert. denied, 511 U.S. 1085 (1994).

[3] MacDonald died during the pendency of the appeal, and the court of appeals granted petitioners Caren Cronk Thomas and the Windy City

of the parade permit ordinance on its face under the First Amendment. See Pet. App. 60a-61a. Ruling on cross-motions for summary judgment, the district court concluded that the criteria in the ordinance did not grant the Commissioner impermissibly broad discretion when acting on permit applications. See Pet. App. 65a-70a. But the court also ruled that the Commissioner's authority to consider whether there are sufficient police officers available to protect marchers amounted to an invalid content-based regulation of speech. See Pet. App. 70a-73a. Further, the court found that the ordinance's failure to require the licensing authorities to initiate judicial proceedings to review a decision denying a permit application and to bear the burden of proof in those decisions created an invalid prior restraint. See Pet. App. 74a-77a.[4]

The court of appeals reversed the judgment of the district court to the extent that it had invalidated portions of the Chicago ordinance.[5] The court rejected petitioners' claim that the ordinance granted impermissible discretion to the Commissioner, finding that the ordinance specified legitimate criteria for acting upon license applications. See Pet. App. 16a-20a. The court also concluded that because the ordinance regulated the time, place, and manner of speech, it should not

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Hemp Development Board leave to substitute as plaintiffs. See Pet. App. 6a. The petition's identification of MacDonald as a party accordingly is incorrect.

[4] While the case was on appeal, the City filed a motion to vacate the injunction based on various amendments that had been made to the ordinance at issue. See Pet. App. 83a. The district court denied that motion, concluding that the amendments did not cure the constitutional infirmities that the court had identified. See Pet. App. 84a-90a.

[5] The court found that because the ordinance had been amended, petitioners' claims with respect to the earlier version of the ordinance were moot, and only the ordinance as amended was properly before the court. See Pet. App. 11a-12a. Petitioners do not contest that ruling in this Court. See Pet. i.

be treated as a prior restraint on speech. See Pet. App. 20a-28a. The court added that the ordinance properly regulated speech, since it did not permit consideration of the content of speech and was narrowly tailored to advance legitimate governmental interests. See Pet. App. 28a-33a. Finally, the court held that this content-neutral licensing ordinance need not supply the elaborate procedural safeguards required when a prior restraint is at issue. See Pet. App. 34a-39a.[6]

ARGUMENT

The decision of the court of appeals was correct. Indeed, the result below was compelled under this Court's decision in *Cox v. New Hampshire*, 312 U.S. 569 (1941), which held that laws requiring marchers to obtain permits should be upheld when they reasonably regulate the time, place, and manner of expression, even if they permit licensing officials to make discretionary judgments about when and where public assemblies should take place.

As the court of appeals recognized, however, the decision below is in conflict with decisions in other circuits that have branded even laws directed only at the time, place, or manner of expression as prior restraints. Moreover, to reach the result below, the court of appeals relied on a decision which this Court has since decided to review, *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000), cert. granted, 121 S. Ct. 2191 (2001) (No. 00-1249). Although, as we explain below, the ordinance at issue in *Thomas* differs in a number

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[6] Judge Rovner dissented in part, disagreeing with the court's holding that the ordinance was content neutral. In her view, the Commissioner's authority to consider whether adequate police resources are available to protect marchers with respect to traffic-related hazards effectively created content-based regulation, since the Commissioner could conclude that marches that provoke a hostile audience reaction could provoke greater traffic-related hazards, and for that reason the ordinance created a type of "heckler's veto" forbidden by the First Amendment. See Pet. App. 43a-50a.

of critical respects from the ordinance at issue here, there is nonetheless a sufficient relationship between this case and *Thomas* that the Court will likely wish to hold this petition pending its decision in *Thomas*. Nevertheless, only the broadest and most radical positions pressed by the petitioners in *Thomas* would even hint at a basis for reversing the court of appeals in this case. Accordingly, after its decision in *Thomas*, unless the Court has embraced the broadest arguments pressed by the petitioners in that case, the petition for certiorari should be denied. To the extent that the decision in *Thomas* does not resolve the confusion in the lower courts on any of the questions presented by the petition in this case, and the Court deems the questions presented in the petition worthy of plenary review, the Court should then grant the petition.

1. Central to all of the arguments pressed by petitioners is their view that the First Amendment ordinarily forbids licensing laws that vest even a modicum of discretion in licensing authorities. For example, petitioners argue that the First Amendment "condemn[s] the inclusion of discretion in ordinances requiring a permit to engage in free speech . . . ." Pet. 20. This view finds no support in this Court's precedents. To the contrary, it is settled that laws empowering licensing officials to regulate the time, place, and manner of expression are constitutionally sound.

The statute at issue in *Cox v. New Hampshire*, like the ordinance at issue here, required demonstrators to obtain a permit before they could lawfully march on public streets. To obtain a permit, applicants were obligated to provide licensing officials with sufficient advance notice "so as to afford opportunity to afford proper policing." 312 U.S. at 576. Thereafter, licensing officials were authorized to fix the time and place of a march "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of

disorder," and a permit would be issued only "if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place, and manner as would avoid disturbance." *Ibid.* This Court upheld the statute, reasoning:

> If a municipality has authority to control the use of its public streets for parades and processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed contravened any constitutional right.

Ibid.

Since *Cox*, this Court has never deviated from the rule that licensing laws may reasonably regulate the time, place, or manner of expressive activities. Thus, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court upheld a sound regulation for public concerts requiring "the best sound for all events," and providing that event organizers "ensure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of [the] Sheep Meadow." *Id.* at 794. The Court acknowledged that these standards required the exercise of discretion, but found that discretion unobjectionable: "While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required of regulations that restrict expressive activity." *Id.*

In short, discretion that is confined to evaluating the time, place, or manner of expression does not render a law subject to facial invalidation under the First Amendment. Only when

the discretion conferred by a challenged enactment enables the government to discriminate between favored and disfavored speakers can it properly be invalidated without reference to the manner in which it has been applied to the party challenging it. As the Court explained in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* at 759. By contrast, as *Cox* and its progeny illustrate, this Court has not indulged facial challenges when a law fails to grant government officials this type of content-based discretion, but merely allows the exercise of discretion with respect to the time, place, and manner in which expressive activities are to take place.

2. Petitioners claim that "a prior restraint analysis [must] be applied to all statutes, ordinances, rules and regulations requiring a permit before citizens may be heard . . . ." Pet. 14. But *Cox* itself upheld a licensing law directed only at the time, place, and manner of expression, and even petitioners do not claim that any subsequent decision of this Court has cast the slightest doubt on the vitality of *Cox*. To the contrary, this Court has repeatedly explained that only laws that forbid speech altogether, rather than regulating it, should be characterized as prior restraints. In *Rock Against Racism*, for example, the Court emphatically rejected an argument that the sound guideline at issue constituted a prior restraint, observing that the guideline "grants no authority to forbid speech, but merely permits the city to regulate its volume to the extent necessary to avoid excessive noise." 491 U.S. at 795 n.5. Similarly, in *Hill v. Colorado*, 530 U.S. 703 (2000), the Court held that a statute restricting protest activity near health care facilities was not a prior restraint, explaining: "Under this statute, absolutely no channel of

communication is foreclosed. No speaker is silenced. And no message is prohibited." *Id.* at 734.

Nor is the existence of discretion in a licensing law enough to brand it a prior restraint. As we explain above, the existence of licensing discretion makes a law vulnerable to facial challenge only when it permits the government to prohibit speech based on an evaluation of its content. In *Freedman v. Maryland*, 380 U.S. 51 (1965), for example, on which petitioners place their primary reliance, the statute at issue allowed a state board to view all films prior to their exhibition and to prohibit the exhibition of films that "are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." *Id.* at 52 n.2. The Court noted the "peculiar dangers" of "a censorship system": "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent breach of government—to the constitutionally protected interests in free expression." *Id.* at 57 (footnote omitted). The Court therefore required rigorous procedural protections "to obviate the dangers of a censorship system." *Id.* at 58. The Court held that to comport with the First Amendment, licensing officials must bear the burden of proving that a film is constitutionally unprotected, their decisions can restrain exhibition of a film only during a specified brief period of time in which the officials must initiate judicial review, and a prompt judicial decision must be assured. See *id.* at 58-59.

Since *Freedman*, this Court has imposed the complicated and burdensome procedures mandated in that case only on laws that permit officials to censor disfavored speech in the same fashion as the system at issue in that case. For example, laws granting licensors entirely unfettered discretion to decide whether to issue licenses are treated as prior restraints because they create a risk of censorship identical to the system at issue in *Freedman*: "without standards governing

the exercise of discretion, a government official may decide who may speak and who may not based on the content of the speech or viewpoint of the speaker." *City of Lakewood*, 486 U.S. at 763. See, *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Laws that do not require licensing officials to act on applications within a specified period of time suffer from the same defect, since "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226-28 (1990) (plurality opinion). See, *e.g.*, *id.* at 238-42 (Brennan, J., concurring in the judgment); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801-02 (1988). But the prior restraint doctrine has never been applied outside of these contexts.

Petitioners nevertheless claim that in *FW/PBS* this Court applied prior restraint doctrine to a licensing law that did not permit officials to act on the basis of content of speech. See Pet. 11-12. To be sure, a majority of the Court characterized the ordinance at issue in *FW/PBS* as a prior restraint, but that was because the ordinance did not require licensing officials to act within a specified period of time, as we explain above. The plurality, for example, wrote that "like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed *where there are inadequate procedural safeguards to ensure prompt issuance of the license*." 493 U.S. at 226 (emphasis supplied). Nevertheless, while the plurality's opinion in that case is not entirely free from ambiguity, a majority of the Court unquestionably concluded that *Freedman* was inapplicable to the Dallas ordinance. The three-Justice plurality, for example, concluded that when licensing decisions must be made within a specified period of time and judicial review is available, *Freedman* did not apply to the

licensing system at issue: "We conclude that the First Amendment does not require the city to bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." 493 U.S. at 230.[7] Three other Justices also rejected application of prior restraint doctrine to the Dallas ordinance, concluding that it created no impermissible risk of censorship of protected speech. See *id.* at 246-48 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (relying on ordinance's content neutrality); *id.* at 259-64 (Scalia, J., concurring in part and dissenting in part) (construing ordinance as regulating pandering and not protected speech). Thus, no decision of this Court has ever applied *Freedman*'s elaborate procedural rules to a content-neutral licensing law.

Accordingly, the court of appeals correctly rejected petitioners' view that even content-neutral regulation of the time, place, or manner of speech should be considered a prior restraint. Laws of this character continue to be governed by *Cox*. And even aside from precedent, there is simply no warrant for applying prior restraint doctrine to the ordinance at issue here. That doctrine—by requiring the licensing authority to initiate judicial review, to bear the burden of proof in a de novo judicial proceeding, and to preserve the status quo until a prompt judicial decision issues—effectively makes judges the actual decisionmakers on license applications. Under *Freedman*, licensing decisions are of no effect if licensing officials cannot convince a judge that they are correct. But when a licensing official is authorized to act only on legitimate and content-neutral criteria, there is no justification to transfer licensing authority to the judiciary.

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[7] The plurality added that the First Amendment required no more than that judicial review be available: "there must be the possibility of prompt judicial review in the event that [a] license is erroneously denied." 493 U.S. at 228.

The ordinance at issue here, moreover, contains the type of legitimate and content-neutral criteria that *Cox* and its progeny hold may be utilized in licensing laws. The ordinance identifies only legitimate criteria for decision unrelated to the content of speech—criteria appropriately based upon the impact of a proposed event on traffic flow and police and fire service. The ordinance silences no one; it governs only the time, place, and manner of expression. Similarly, it disqualifies no one from receiving a permit, requires that decisions be made within specified time periods, and guarantees applicants whose requests are denied an alternate permit for an event as similar as practicable to the original proposal. This ordinance prevents no speech; it merely regulates when and where speech will occur. That has never before been thought to constitute a prior restraint.

3. Petitioners also claim that various provisions of the ordinance delegate impermissibly broad discretion to the Commissioner of Transportation. They point to the requirement that the Commissioner consider whether a proposed event will "substantially or unnecessarily interfere with traffic," whether there are "a sufficient number of peace officers to police and protect lawful participants in the activity and non-participants from traffic related hazards," and whether the proposed event would create a "concentration of persons, animals, vehicles or things at the assembly and disbanding areas and along the parade . . . route" that would "prevent proper fire and police protection or ambulance service." See Pet. 19-20. But again, the First Amendment does not condemn all discretion when making licensing decisions; as we explain above, a challenged law should be condemned only when it permits licensing officials to act on the basis of content of speech. And for that reason, "standards limiting the licensor's discretion will eliminate this danger . . . ." *City of Lakewood*, 486 U.S. at 758. The ordinance at issue here contains ascertainable standards that circumscribe licensing discretion and ensure that only the

time, place, and manner of expression will be considered, as the court of appeals correctly concluded. See Pet. App. 16a-20a.[8]

Nothing in this Court's precedents lends support to petitioners' claim that Chicago's ordinance delegates impermissibly broad discretion. In *Boos v. Barry*, 485 U.S. 312 (1988), for example, the Court upheld a law that authorized the police to order demonstrators to disperse whenever they reasonably believe that they threaten to disrupt the "peace and security" of foreign embassies. *See id.* at 332. Similarly, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court upheld an ordinance that permitted police to halt demonstrations near schools when "normal school activity has been or is about to be disrupted." *Id.* at 112. And as we explain above, the statute upheld in *Cox* also permitted licensing authorities to exercise substantial discretion. The degree of discretionary authority upheld in these decisions

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[8] In addition to challenging the provisions of the ordinance that we discuss above, petitioners also attack the provision in the ordinance permitting the Commissioner to assess whether the application contains sufficient information about the proposed route and crowd estimate to allow the Commissioner to evaluate the proposed event under this section. See Pet. 20. That claim, however, is not properly before this Court because petitioners never advanced it in the district court. See Pet. App. 65a-70a, 100a-101a. Petitioners instead made this argument for the first time on appeal, but since the district court had not enjoined this portion of the ordinance, this was not a proper ground on which to affirm the district court's judgment, and the court of appeals properly declined to reach it. See Pet. App. 14a-20a. In any event, this objection has no more merit than any of the others, since this provision also does not act to silence any speaker. Not only are applicants denied a permit under this provision entitled to an alternate permit, but when an application is denied on this basis, the Commissioner of Transportation must also "specify what additional information must be provided in a new or amended application." Municipal Code of Chicago, Ill. § 10-8-330(*l*) (2000).

differs in no meaningful respect from the scope of discretion contained in Chicago's ordinance.[9]

Indeed, some measure of discretion is essential if the safety of the public is to be protected. Whether the route and size of a proposed event will unduly interfere with ambulance service, for example, is simply not susceptible to a precise formula. Public safety cannot practicably be secured unless

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[9] In the briefest of footnotes, petitioners embrace Judge Rovner's view that the provision in the ordinance permitting consideration of whether there are adequate police resources available to protect participants and onlookers from traffic-related hazards is an impermissible content-based criterion, since it permits consideration of a hostile audience reaction and thus authorizes what amounts to an impermissible "heckler's veto." See Pet. 20 n.16. This argument does not appear to be fairly included in any of the questions presented in the petition. See Pet. i. And in any event, it is based on an unwarranted construction of the ordinance. On its face, the ordinance does not permit consideration of whether sufficient resources are available to protect demonstrators from a potentially hostile audience, but only whether there are resources available "to protect lawful participants in the activity and non-participants from traffic related hazards." Municipal Code of Chicago, Ill. § 10-8-330(h)(2) (2000). The ordinance makes no reference to hostile audience reaction, and petitioners adduced no evidence that it has ever been construed or applied in that fashion. The legitimacy of this criterion should be clear; the potential hazards that traffic poses for demonstrators occupying the public ways unless police are available to cordon off an event are plain. Indeed, at least two other courts have rejected arguments that ordinances permitting consideration of whether sufficient police resources are available to protect participants in a proposed event from traffic-related hazards is impermissible. See *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), cert. denied, 502 U.S. 899 (1991); *Handley v. City of Montgomery*, 401 So. 2d 171, 180-83 (Ala. Crim. App. 1981). Moreover, construing the ordinance to permit consideration of a hostile audience reaction—when the ordinance itself contains no language mandating consideration of such a criterion—would violate the settled rule that challenged laws should be construed when possible in order to avoid constitutional infirmity. See, *e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Frisby v. Schultz*, 487 U.S. 474, 482-83 (1988); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976).

officials retain at least a modicum of discretion to consider a proposed event's impact upon public safety. The fact that some amount of judgment and discretion must be exercised even when regulating speech within the meaning of the First Amendment simply bows to practical reality. As this Court has observed, "[c]ondemned to the use of words, we can never expect mathematical certainty in our language." *Grayned*, 408 U.S. at 110.

4. Petitioners correctly observe that the holding below on the prior restraint issue is in conflict with decisions in other circuits holding that even content-neutral licensing laws should be evaluated as prior restraints. See Pet. 11, 13, 15-16. This Court has also noted the existence of a split of authority. See *City News & Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743, 746 (2001). In the decision below, the court of appeals acknowledged that conflict as well. See Pet. App. 25a-26a, 35a-36a.[10] The practical importance of

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[10] The disarray in the case law may not be as aggravated as it appears. Most of the cases that have applied prior restraint doctrine to content-neutral licensing laws involved laws regulating establishments providing sexually oriented entertainment. See, *e.g.*, *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 998, 999-1000 (4th Cir.) (en banc), cert. denied, 516 U.S. 1010 (1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.), cert. denied, 516 U.S. 909 (1995); *Harkins v. Greenville County*, 533 S.E.2d 886, 891-92 (S.C. 2000), cert. denied, 121 S. Ct. 880 (2001). As the Seventh Circuit has observed, there may be greater justification for applying prior restraint doctrine to those laws, since their applicability is triggered by the content of an applicant's speech. See *Thomas*, 227 F.3d at 927-28. Nevertheless, some courts have declined to apply *Freedman*'s requirement that license applicants be assured of a prompt judicial decision to content-neutral laws that regulate sexually oriented establishments. See, *e.g.*, *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121 (7th Cir. 2001); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220-21 (10th Cir. 1990); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1120-21

the questions presented here is also clear; permit requirements like the one at issue here are ubiquitous—no doubt at least in part because this Court blessed them in *Cox*—and if local governments must now comply with *Freedman* whenever they fail to grant applicants everything they seek, the practical difficulties facing local officials will be enormous, as the court of appeals observed. See Pet. App. 38a-39a. And presumably because of the conflicting results in the lower courts and the importance of this issue, the Court has granted

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(1st Cir. 1981); *P.M. Realty & Investments, Inc. v. City of Tampa*, 779 So. 2d 404, 407-08 (Fla. Dist. Ct. App. 2000). But regardless of whether cases involving licensing laws for sexually oriented businesses can be distinguished from cases like this one, we acknowledge that the decision below, while consistent with a number of other decisions, see, *e.g.*, *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1326-28 (1st Cir. 1993); *Handley*, 401 So. 2d at 180-83; *State v. Frinks*, 201 S.E.2d 858 (N.C. 1974); *Outdoor Media Dimensions, Inc. v. State*, 945 P.2d 614, 623-24 (Or. Ct. App. 1997), aff'd on other grounds, 20 P.3d 180 (Or. 2001), cannot be reconciled with the Eleventh Circuit's application of prior restraint doctrine to a public congregation ordinance that the court found to be content neutral. See *Cannabis Action Network v. City of Gainesville*, 231 F.3d 761, 774-76 (11th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3657 (U.S. March 29, 2001) (No. 00-1503). Less clear is whether the decision below is in conflict with the law in the Second Circuit, which the court of appeals understandably characterized in the decision below as "unclear." Pet. App. 36a. In *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999), the court remanded the case to the district court for a determination whether the administration of the ordinance at issue reflected excessive discretion, but added that under a content-neutral law, the government need not bear the burden of initiating judicial review. See *id.* at 126-29. While that approach appears consistent with the decision below, the court also characterized any licensing law as a prior restraint no matter how confined the discretion that it confers. See *id.* at 124, 128. The court took the same approach in *MacDonald v. Safir*, 206 F.3d 183, 194-95 (2d Cir. 2000). The Tenth Circuit has also made this error, even though it upheld the law before it. See *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1253-54 (10th Cir.), cert. denied, 531 U.S. 811 (2000).

plenary review in *Thomas*, which was relied upon by the court of appeals in the decision below.

To be sure, it is far from clear that even a decision by this Court to reverse in *Thomas* will shed much light on the correct resolution of this case. The ordinance at issue in *Thomas* renders certain applicants altogether ineligible for permits. See 227 F.3d at 924-25. For that reason, the Court might treat the ordinance as a prior restraint or find it otherwise impermissible under the First Amendment, rather than upholding it as a regulation of time, place, or manner of speech. Such a ruling would not bear on the ordinance at issue in this case, which renders no one ineligible for a permit, and silences no one either. Only if this Court embraces the broadest arguments advanced by the petitioners in *Thomas*, and holds that any licensing or permit law involving expressive activities is governed by *Freedman*, will the decision in that case bear on this one. Nevertheless, given the relationship between the issues presented in *Thomas* and those presented in the instant petition, the Court likely will wish to hold this petition pending its decision in *Thomas*. At that point, should the judgment in *Thomas* be affirmed, the Court should deny the petition for a writ of certiorari. Should the judgment be reversed, it may be appropriate at that point for the Court to grant plenary review or, in the event that the Court reverses in *Thomas* in a holding sufficiently broad to bear on this case, to remand the case to the court of appeals for reconsideration.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Thomas*.

Respectfully submitted,

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